

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

NATIONAL ASSOCIATION OF)
DIVERSITY OFFICERS IN)
HIGHER EDUCATION, ET AL.,)
Plaintiffs,) CASE NUMBER: 1:25-cv-0333-ABA
v.)
DONALD J. TRUMP, ET AL.,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS - MOTIONS HEARING
BEFORE THE HONORABLE ADAM B. ABELSON
UNITED STATES DISTRICT JUDGE
Thursday, April 10, 2025
Courtroom 7D

A P P E A R A N C E S

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P R O C E E D I N G S

(3:02 p.m.)

THE COURTROOM DEPUTY: The matter now pending before this Court is Civil Docket Number ABA-25-0333. National Association of Diversity Officers in Higher Education, et al., v. Trump, et al. This matter now comes before this Court for the purpose of a motions hearing.

Counsel for the plaintiffs, followed by counsel for the defendants, will you please introduce yourselves for the record.

MS. MENSCHEL: Good afternoon, Your Honor. Brooke Menschel for the plaintiffs.

MR. BURRA: Good afternoon, Your Honor. Ananda Burra.

MS. SHAH: Good afternoon, Your Honor. Niyati Shah for plaintiffs.

MS. AHMAD: Good afternoon, Your Honor. Alizeh Ahmad for plaintiffs.

MS. WIGGINS: Good afternoon, Your Honor. Audrey Wiggins for plaintiffs.

MR. MOORE: Good afternoon. Sterling Moore for plaintiffs.

MS. GHEIBI: Good afternoon, Your Honor. Pardis Gheibi for the defendants.

THE COURT: All right, great. Good afternoon.

1 Thank you for being here.

2 We are, as you all know, here on the plaintiffs' motion
3 to vacate Preliminary Injunction Order, that's ECF 77. There
4 are a couple of various issues presented by this motion. It
5 is the plaintiffs' motion, so I'm happy to hear from the
6 plaintiffs first.

7 **MS. MENSCHER:** Your Honor, would you like me at the
8 podium?

9 **THE COURT:** Wherever you feel most comfortable.

10 **MS. MENSCHER:** Good afternoon, Your Honor. We're
11 here today because seven weeks ago, in the seven weeks since
12 the Court issued its Preliminary Injunction, the plaintiffs
13 and their members and millions of people around the country
14 who are similarly situated have been suffering significant
15 ongoing and irreparable harm because of the executive orders
16 at issue here and because of the agency defendants'
17 understanding of them.

18 We've been candid with the Court. We've been upfront
19 with the plaintiffs and we're here because we're trying to
20 obtain the fastest, broadest relief possible for our clients
21 through the Rule 59(e) mechanisms that are specifically
22 contemplated in the Federal Rules of Civil Procedure, in the
23 Federal Rules of Appellate Procedure, recognized by the
24 Supreme Court, and recognized by the Fourth Circuit.

25 We're aiming to provide precisely what the Fourth Circuit

1 has requested. We're aiming to show precisely how the
2 administration and the agencies understand and interpret the
3 Executive Orders, and we're trying to do so in a matter that
4 conserves judicial resources and conserves resources of the
5 parties, and that the Fourth Circuit has suggested is not only
6 allowed, but also appropriate.

7 The Rule 59(e) is the appropriate mechanism for the
8 plaintiffs to use here. That's clear from the face of the
9 rules. It's clear from the face of Federal Rule of Appellate
10 Procedure 4, and it's clear in both the Fourth Circuit and
11 Supreme Court precedent.

12 The defendants have not provided any authority to the
13 contrary. And, frankly, their arguments are a little bit
14 more-- are little more than a distraction. We are prepared to
15 move quickly. If the Court grants our Rule 59(e) motion, we
16 are prepared to file an amended complaint and a preliminary
17 injunction in short order with an eye towards relieving the
18 ongoing harm that our clients are suffering.

19 I'm happy to address any specific questions that you
20 have.

21 **THE COURT:** All right, so let's start with the
22 jurisdiction issue. So Federal Rules of Appellate Procedure
23 4, 4(a)(4)(A) is the rule about the effect of the motion, of
24 certain types of the motions on the jurisdiction -- well,
25 maybe the jurisdiction, but at least of the Court of Appeals.

1 But at least the effect of the Notice of Appeal. And a Rule
2 59 motion to alter or amend is one of the specified rules or
3 specified motions under that rule.

4 All of the -- am I correct that all of the cases
5 addressing the application of that rule that either side has
6 cited are motions to alter or amend a final judgment, not a
7 Preliminary Injunction?

8 **MS. MENSCHER:** Your Honor, I do not believe that
9 that is -- I'm trying to run it back through. I don't believe
10 that they are all motions to amend a final judgment. I think
11 that there are -- there is a case and I will tell you exactly
12 what it is in a moment, which was a partial summary judgment
13 motion that did not ultimately dispose of the case. It was a
14 partial summary judgment motion.

15 **THE COURT:** It was a qualified immunity case, right?

16 **MS. MENSCHER:** Yes.

17 **THE COURT:** Okay. That's true. So that's an
18 interlocutory appeal.

19 **MS. MENSCHER:** Yes.

20 **THE COURT:** None of them are Preliminary
21 Injunctions, though. I'm not saying that's dispositive on the
22 analysis; I just want to make sure that I'm reading the cases
23 consistent with the parties.

24 **MS. MENSCHER:** Yes, I believe that's true, Your
25 Honor. But I would also say that in *Gelin v. County of*

1 *Baltimore*, the Fourth Circuit expressly said in footnote 3
2 there that it would be appropriate in -- for a Rule 59(e)
3 motion for anything from which an appeal could be taken, an
4 interlocutory could be taken under Rule 54.

5 **THE COURT:** Right. Any appeal from which an appeal
6 can be taken constitutes a judgment for purposes of that rule.

7 All right. So my understanding of FRAP, I'll call it
8 FRAP 4, and specifically as amended in 1979 and then in 1993,
9 was that there were scenarios where a party filed a Notice of
10 Appeal. Then a motion is filed in the District Court, Rule 59
11 or otherwise. For a certain period of time, the filing of
12 that motion essentially extinguished the Notice of Appeal.
13 And the rules required at that time the filing of a new Notice
14 of Appeal and that various parties, particularly pro se
15 parties, were caught unaware and then they didn't have a
16 Notice of Appeal and appeals were untimely.

17 And so my understanding of the rule as amended is that
18 when a judgment, meaning an appealable order is appealed and
19 then one of the specified motions is filed, that the appeal
20 is, I think in the words of the Advisory Committee notes,
21 suspended in a way. But in any event, the District Court has
22 jurisdiction to rule on the motion.

23 Is that all correct?

24 **MS. MENSCHER:** Yes, Your Honor. That is consistent
25 with our understanding.

1 **THE COURT:** All right. So under your understanding
2 in part because Rule 59 is specified in FRAP 4, that means
3 that jurisdiction remains in this court to at least rule on
4 your Rule 59 motion.

5 **MS. MENSCHER:** Yes, Your Honor. And also that the
6 Court of Appeals cannot, in fact, take up or rule on the
7 Notice of Appeal and the matter on appeal until this Court
8 rules on the Rule 59 motion.

9 **THE COURT:** So you are advocating on behalf of your
10 clients and seeking and saying that you intend to file an
11 amended complaint and a new motion for a Preliminary
12 Injunction to seek, as you I think put it, broad relief.

13 The Fourth Circuit considered the Government's appeal and
14 specifically its motion to stay and granted that motion to
15 stay. How am I to square your request for relief with the
16 Fourth Circuit's stay of your earlier motion and your
17 statement that what you continue to seek is broad injunctive
18 relief?

19 **MS. MENSCHER:** Yes, Your Honor. I think the Fourth
20 Circuit's opinion, and specifically the concurrences by Judge
21 Diaz and Judge Harris point to exactly the issue which was
22 that at that time there was not sufficient information about
23 how the Government and how defendants would be understanding
24 the Executive Orders, how they would be implementing the
25 Executive Orders, and how they would be taking steps to

1 perhaps rely on the savings clause, perhaps not. And the
2 Fourth Circuit in both of those concurrences specifically
3 said, at this point we do not think that the information is in
4 the record. We disagreed and we believe that should we fully
5 brief, the Fourth Circuit would agree with us.

6 However, in this posture we are now trying to present to
7 you in hopes that you agree with our understanding that what
8 has developed over the last seven weeks shows precisely what
9 the Fourth Circuit was looking for and shows precisely that
10 the agency defendants have, in fact, implemented these
11 Executive Orders and understood and interpreted them to cause
12 significant more chilling, significant more violations of the
13 First Amendment and the Fifth Amendment and otherwise. And
14 that with that more robust information before the Fourth
15 Circuit, they would not stay Your Honor's hopeful -- I'm being
16 optimistic here -- hopeful preliminary injunction, and
17 instead, provide the appropriate relief, the relief that we
18 think is appropriate.

19 **THE COURT:** Okay, so play this out for me.

20 **MS. MENSCHER:** Sure.

21 **THE COURT:** Let's say I were to grant your motion.
22 What comes next?

23 **MS. MENSCHER:** So, Your Honor, if you were to grant
24 the Rule 59(e) motion, our understanding then is that the
25 Notice of Appeal would be a nullity and that there would be

1 nothing to appeal.

2 **THE COURT:** So you would file a motion to dismiss
3 the appeal?

4 **MS. MENSCHER:** We do not believe that we are
5 required to. That is our understanding at this point, but
6 that we would likely provide a notification. And I don't want
7 to speak out of turn without checking on exactly what format
8 that would be to the Fourth Circuit, but there would be
9 nothing to appeal were you to vacate the Preliminary
10 Injunction. So there would be nothing up on appeal.

11 **THE COURT:** And then you would be filing an amended
12 complaint or would this be a motion for leave?

13 **MS. MENSCHER:** Your Honor, I think that either would
14 be appropriate. I think that we are still as a strategic
15 matter, making some adjustments and decisions about that. And
16 frankly, Your Honor, I think it maybe would depend on the
17 timing or exactly what appeared in a forthcoming order.

18 **THE COURT:** All right. Recognizing that
19 circumstances can change and decisions can change, flesh out
20 for me what an amended complaint would look like. Would this
21 now be an as-applied challenge? Would it remain a facial
22 challenge? And if it's a facial challenge, what would be
23 different than the record that was already before me before?

24 **MS. MENSCHER:** Sure, Your Honor. It would be a
25 facial challenge, remain a facial challenge. There would

perhaps be additional claims that would be a little bit broader and a little bit more targeted towards agencies.

But beyond that, I think that the key question, the key issue is that the agencies have now understood, and implemented, and taken steps to, in fact, act on the administration's Executive Orders. And that that has played out over the last number of weeks in a way that was not, frankly, before you before because it could not have been. Because the agencies had not done, had not followed the president's instructions yet. And putting that information into the record is, as we understand it, specifically what the Fourth Circuit asked for and indicated that they thought it was a little bit too early to have evaluated whether or not there was this broad chilling effect.

But we know at this point that that is happening. We know and in -- it was ECF No. 68, a motion for a status conference -- or emergency status conference before Your Honor we put forward even at that time, significantly more information about how the agencies were implementing the Executive Orders that you did not have before you and that were not part of the preliminary injunction. And that information is only many fold broader now, a number of weeks later. I'm happy to provide for you a couple of examples, but I think that --

THE COURT: Yeah, what are some examples? The ECF

1 68 was your motion relating to compliance with the PI, right?

2 **MS. MENSCHER:** Yes, Your Honor.

3 So for one thing that I would mention which -- and so
4 there are a number outlined in that particular thing. One, as
5 recently as last week there were news reports about a state
6 department notifying contractors around the world who
7 contracted all with agencies that they would be required that
8 all contractors, anywhere around the world, would be required
9 to certify that they do not engage in DEI. And the
10 notification reportedly includes language that says, "and we
11 are sending this out in order to comply with the president's
12 Executive Orders."

13 That is just one sort of very specific example. But that
14 is following the Executive Orders, imposing the certification
15 requirement now internationally and affecting contractors
16 elsewhere in a way that is the kinds of things that in many
17 cases we could only anticipate when we were before you
18 originally on the Preliminary Injunction.

19 **THE COURT:** Well, there was -- I mean, there were
20 various examples in the record at that time of interpretation
21 and as I recall, implementation. So why from the -- let me
22 put it this way: Why would you envision that the motions panel
23 in the Fourth Circuit would consider that any different than
24 the record that already existed?

25 **MS. MENSCHER:** Your Honor, I think -- I mean, for

one thing I think I would go back to the fact that we think if we were able to fully -- if we were in a position where we had to fully brief before the Fourth Circuit, we still do ultimately think we would be successful. But again, we're trying to do this in a time sensitive fashion and we think that this is a better and more efficient way because doing it that way through the -- going through the Fourth Circuit would end up, we think, expending unnecessary judicial resources and also causing significant delay. So as a top line I would say that.

I think more specifically I would say there is an amount of information, there were -- that is just much, much greater now. It is across all agencies and we are seeing it happen all the time.

And I guess the last part I would say is in terms of the standard, the Fourth Circuit just last year in a case that I apologize I'm going to mispronounce, but is *Daulatzai* which is cited in I believe our opening brief, talked a lot about the standard and how the standard for vacating should be looking to what the standard for the thing you're trying to do is.

And here we're looking to and thinking about amending. The standard in that particular instance as the Fourth Circuit talked about it is -- was to say that the Court could essentially vacate for almost any reason that the Court saw fit. And that if you were looking to what would be required

1 after the fact, that you would look to -- well, you would only
2 look to what would be required if there was a showing of
3 prejudice.

4 The Government here has not shown any prejudice and
5 can't, frankly, because we are trying to do the thing. We're
6 trying to vacate the Preliminary Injunction. We're not --

7 **THE COURT:** So would the injunction that you at
8 present would envision seeking, how would the, if at all,
9 Preliminary Injunction look different than the Preliminary
10 Injunction that you sought for and/or that I issued before?

11 **MS. MENSCHER:** Your Honor, it's a -- it's a -- one,
12 I think that we are still fine tuning a little bit, so I would
13 ask that you take that into account. But I think that in part
14 the question is a bit broader. I think we've seen more of the
15 ways that things are being implemented. And so this precise
16 language maybe would be different. And -- but I don't know if
17 necessarily the words of, for example, our proposed order
18 would necessarily be hugely different. I think there would be
19 some small changes to it, but I think that what would be in
20 the record at that point would be quite a bit different.

21 And I think, in addition, because of the potential APA
22 new claims or other related things, it would be as to that as
23 well.

24 **THE COURT:** And would the new evidence go to
25 irreparable harm or likelihood of success on the merits?

1 **MS. MENSCHER:** I think both.

2 **THE COURT:** So from a judicial economy perspective,
3 let's say hypothetically we were in a situation where we were
4 briefing a new motion for a Preliminary Injunction and the
5 injunction that you were seeking is the same and
6 hypothetically the injunction that I would grant would be the
7 same. Why wouldn't that just delay an appeal on the question
8 of whether you are entitled to Preliminary Injunctive relief
9 on a facial -- on facial claims challenging these Executive
10 Orders?

11 **MS. MENSCHER:** Your Honor, I mean, I would go back
12 to I think what the Fourth Circuit in those two concurrences,
13 what we understood the Court to be asking for which was more
14 information about how this is playing out on the ground. And
15 whatever any future injunction that Your Honor might issue
16 might be, I think the question that they were looking to was
17 really about what evidence and what information we had put
18 before you and what the reality on the ground was at that
19 time. And the truth is, the reality on the ground is just,
20 frankly, very different now than it was at the time that we
21 moved originally.

22 We read the Fourth Circuit's opinion to be asking for
23 that information specifically and, in fact, saying this is not
24 the right time now.

25 One of the concurrences specifically said at this point,

1 and emphasized at this point it is appropriate to stay the
2 injunction, but that is not to say that if more information
3 comes to light that will still be -- that will still be the
4 case. And we are, frankly, just trying to provide that
5 information to you and to the Fourth Circuit for your
6 consideration.

7 **THE COURT:** Okay. Thank you.

8 Ms. Gheibi.

9 **MS. GHEIBI:** Thank you, Your Honor.

10 So as we highlighted in our briefing, we think this Court
11 plainly lacks jurisdiction to vacate the Preliminary
12 Injunction motion. The most relevant ruling on that issue or
13 rather the most relevant opinion is the *In re Murphy-Brown*
14 opinion from the Fourth Circuit where the Fourth Circuit goes
15 on to say -- I'm quoting here from page 793. It says, "We
16 have held the District Court lose its jurisdiction to amend or
17 vacate its order after a Notice of Appeal has been filed." It
18 then --

19 **THE COURT:** Wasn't that the gag order? I mean, that
20 was not one of the rule FRAP 4 motions though, right?

21 **MS. GHEIBI:** But Your Honor, the premise of the
22 ruling is still communicating the same thing.

23 The next sentence the Court says, "Or more generally, a
24 District Court loses jurisdiction when the Court of Appeals
25 assumes jurisdiction." And as the Supreme Court explains in

1 the *Griggs* case, the whole premise of these rules and the way
2 they're structured is to avoid a situation which the District
3 Court and the Court of Appeals are exercising jurisdiction
4 over the same cases. Simultaneous jurisdiction is what
5 they're trying to avoid. The rules and their applications are
6 trying to facilitate this passing of the baton.

7 **THE COURT:** So I was, frankly, a little confused by
8 that language in *In re Murphy-Brown* because it was citing a
9 1978 case which was before the 1979 amendments, and certainly
10 before the 1993 amendments. So it's the current rule that
11 applies.

12 And am I wrong that at that time in 1978 that was the
13 correct statement, that there was no more jurisdiction,
14 including to adjudicate a motion to alter or amend, but now
15 there is?

16 **MS. GHEIBI:** Is Your Honor referring to Rule 4, the
17 amendment?

18 **THE COURT:** Yes.

19 **MS. GHEIBI:** Well, Rule 4 is just the tolling
20 provision. It doesn't mean -- we don't understand Rule 4 to
21 be conferring jurisdiction on the District Court; it's simply
22 to provide for tolling.

23 **THE COURT:** But how could FRAP 4 say what it says if
24 a District Court where a Notice of Appeal has been filed, how
25 could it include a Rule 59 motion in that list?

1 **MS. GHEIBI:** Because it's contemplating a situation
2 in which the Rule 59(e) motion is filed before a Notice of
3 Appeal is filed. In that case, when a District Court has a
4 pending post-judgment motion before it, it's actively
5 exercising jurisdiction over that issue. So it doesn't make
6 sense to pass the baton yet. But in a situation where the
7 District Court doesn't have any pending motion before it and
8 the Notice of Appeal is filed, the baton has already passed.

9 **THE COURT:** I just point you to the commentary to
10 the 1993 amendment to that rule which expressly states that it
11 is envisioning a scenario where a Notice of Appeal is filed
12 and then a post-trial motion is filed. It said, among other
13 things, "The amendment provides that a Notice of Appeal filed
14 before the disposition of a specified pretrial motion will
15 become effective upon the disposition of the motion. A notice
16 filed before the filing of specified motions or after, is in
17 effect suspended until the motion is disposed of."

18 So am I missing something?

19 **MS. GHEIBI:** Is that the language that says it self
20 destructs?

21 **THE COURT:** This is the 1993 amendments. And right,
22 it is now clear that the Notice of Appeal did not self
23 destruct in the sense that an appellant must then file a new
24 Notice of Appeal. Instead, as I understand the Rules
25 Committee's commentary to be, it doesn't self destruct; it

1 does mean that the District Court can, and should, and, in
2 fact, I think must decide the Rule 59 motion and then we'll
3 handle the appeal once that motion is decided.

4 **MS. GHEIBI:** But I think, Your Honor, I point the
5 Court to the Fourth Circuit's precedence here that really talk
6 about this exact situation where plaintiffs are essentially or
7 the parties are essentially asking both courts to rule on the
8 same issue. And I think if I may just quote from *In re*
9 *Murphy-Brown* --

10 **THE COURT:** The gag order. The gag order case.

11 **MS. GHEIBI:** I'm sorry? Yes, the gag order case.
12 But in any event, the language is relevant where it said,
13 essentially allowing the District Court's post-appeal ruling
14 to stand would invite District Courts to track cases on the
15 Appellate Court's docket and when a reversal seems possible or
16 imminent, to pull the rug out from under the Appellate Court
17 and the parties. This sets up an endless game of cat and
18 mouse.

19 And that's exactly what plaintiffs are requesting this
20 Court to do. It seems clear that plaintiffs have --
21 plaintiffs now argue that they believe they'll win the appeal
22 and if that's the case then they should be briefing the
23 appeal. But given that the Fourth Circuit has strongly
24 indicated that it's going to reverse, plaintiffs are back here
25 at the District Court level asking the District Court to pull

1 the rug from underneath the Court of Appeals so that they can
2 get a second bite at the apple. And we don't think that would
3 be appropriate consistent with the rules and precedent.

4 And if I may note, as plaintiffs were discussing the kind
5 of motion they're contemplating, they're still looking for a
6 facial motion here. And as we explained in our brief --

7 **THE COURT:** So just to make sure I'm tracking, that
8 goes to whether -- not whether I have jurisdiction, but
9 whether I should grant the motion.

10 **MS. GHEIBI:** That's right, that's right.

11 So just moving on to the type of motion we're talking
12 about here, plaintiffs are essentially -- they couldn't
13 identify how different the injunction would be because it
14 seems fairly clear that plaintiffs are looking for exactly the
15 same injunction. They're still moving for facial challenges.
16 That's what they plan to do. And what the Court of Appeals
17 said, the concurrence by Judge Harris, she explains that what
18 the orders say on their face and how they are enforced are two
19 different things. That may be true, but those are two
20 different challenges.

21 The Court then goes on to say on their face they're
22 distinctly limited. The determination provision -- again, the
23 same arguments that we made.

24 And then the last sentence of that paragraph that we cite
25 on page 6 is "This case, however, does not directly challenge

1 any such action." And that was the case again. Plaintiffs --

2 **THE COURT:** I'm sorry, what are you quoting there?

3 **MS. GHEIBI:** Judge Harris' concurrence where at the
4 end of her concurrence she said, "This case, however, does not
5 challenge any such action." Plaintiffs have identified
6 examples of implementation, but their challenge was
7 fundamentally misdirected. That's what the Fourth Circuit
8 concurrences sort of illustrate. There's nothing wrong with
9 the Executive Orders on their face. They're distinctly
10 limited. This is what they say.

11 **THE COURT:** Well, I'm not sure she went so far as to
12 say there's nothing wrong with them.

13 **MS. GHEIBI:** Or it seems likely that there is. I
14 mean, all three judges agree that the Government is likely to
15 succeed on the merits of the First Amendment and Fifth
16 Amendment claim.

17 But in any event, the Court there was distinguishing
18 between a facial challenge, the Executive Orders on their face
19 and an as-applied challenge to any particular agency action or
20 implementation. Plaintiffs are thinking about bringing a
21 facial challenge here. We'd be back here all over again. It
22 would just make the process far more inefficient because it
23 would kick the can down the road on those questions.

24 And to the extent plaintiffs and us seem to disagree
25 about what the Court of Appeals was saying there, then the

1 solution is to allow the Court of Appeals to issue an opinion
2 and provide guidance to the parties and the Court about
3 exactly -- about the ruling on the merits. It's not to sort
4 of, again, pull the rug from underneath the Court of Appeals
5 and get a second bite at the apple here.

6 And so -- oh, and one thing I'll note is to the extent
7 plaintiffs are thinking about bringing as-applied challenges,
8 we don't think any of those would be properly part of this
9 case in any event. That's a completely different case. It
10 would be a challenge to any particular agency action. The
11 cause of action would be different. The posture of the
12 challenge would be different. Obviously the remedy would be
13 very different. It would be targeted at something very
14 different.

15 **THE COURT:** You're saying if they were to bring an
16 as-applied challenge in an amended complaint or otherwise that
17 would be just a different claim. That's what you're saying?

18 **MS. GHEIBI:** Yes. We would not think that that
19 would be appropriately part of this case. They're
20 fundamentally different, different claims and it is just a
21 fundamentally different request. It's a fundamentally
22 different type of claim as opposed to a facial challenge to
23 Executive Orders.

24 And we'll note that this past Friday, the Supreme Court
25 in the stay order in *California v. Department of Education*

1 which pertained to the termination of certain grants
2 pertaining to DEI, the Court there said that the District
3 Court did not have jurisdiction to grant the remedy under the
4 Tucker Act, that that needs to go to the Court of Federal
5 Claims.

6 So there are also serious questions about whether or not
7 an as-applied challenge here would even have jurisdiction in
8 the District Court. Again, plaintiffs would have to bring
9 those claims out for us to make those determinations.

10 But in any event, those are not the claims they brought.
11 That's not this case. It's a completely different case and
12 plaintiffs shouldn't be given an opportunity to try again with
13 different facts. So that is -- unless there are any further
14 questions.

15 **THE COURT:** Not for now, thank you.

16 **MS. GHEIBI:** Thank you.

17 **MS. MENSCHER:** Your Honor, may I just briefly
18 address a few things? During counsel's discussion, she
19 strikingly focused almost entirely on whether or not
20 preliminary -- a new Preliminary Injunction should be granted.
21 That was the bulk of her argument. And that is just not
22 what's before the Court today. I mean, we have been pretty up
23 front about the fact that we intend for it to be in short
24 order. But the question before Your Honor today is a much,
25 much narrower one. And it's one that as we said and as Your

1 Honor acknowledged, the Advisory Committee notes say it is
2 appropriate procedure here. The Federal Rules of Civil
3 Procedure, the Federal Rules of Appellate Procedure, and the
4 Fourth Circuit, the Supreme Court, and many, many other courts
5 as well.

6 Counsel is discussing gamesmanship and they put it in
7 their brief and they're accusing us today of doing so. That
8 is, frankly, I think a little bit of a strange point and a
9 strange discussion when we are saying exactly what it is we're
10 trying to do.

11 The Supreme Court has addressed this very question both
12 in *Griggs*, where the Supreme Court said oh, it doesn't matter
13 whether or not the Notice of Appeal is filed before the motion
14 that's listed in Rule 59(e). But also in *Banister v. Davis*,
15 the 590 U.S. 504. And that was a 2020 case where the Supreme
16 Court specifically rejected claims that the use of Rule 59(e)
17 to vacate an order was an improper workaround. And the Court
18 instead there said that the option to vacate within this very
19 strict timeline, again, 28 days, was actually a feature of the
20 system and not a bug.

21 And I would say there the Court also noted why we haven't
22 seen many cases in sort of a similar posture. I believe it is
23 footnote 2 in that case talks about how one of the -- it is
24 often the 28 days prevents new evidence from being developed,
25 prevents new arguments from coming to light.

1 But again, here not by plaintiffs' doing, but by
2 defendants' doing, that is all -- that has all developed
3 within the time period contemplated by the rules.

4 Your Honor had --

5 **THE COURT:** The evidence that you think would
6 bolster likelihood of success on the merits of a facial First
7 Amendment and Fifth Amendment claim.

8 **MS. MENSCHER:** Yes, Your Honor. And I would also
9 say Judge -- Chief Judge Diaz in his concurrence in footnote 1
10 of his concurrence at 4, he cited a facial challenge. He
11 said, "I likewise reserve judgment on the extent to which the
12 Government relies on the Order's savings clause provisions as
13 it enforces the Order's directives against federal
14 contractors, grantees and private entities." And he cites
15 *City and County of San Francisco v. Trump*. And that was a
16 facial challenge there.

17 And it is the same thing here where the relevant
18 information that we understand Chief Judge Diaz and Judge
19 Harris to be seeking was about the extent to which the
20 Government is relying on the savings clause provisions and how
21 exactly the Government is going ahead and implementing these
22 Executive Orders.

23 **THE COURT:** So when both Judge Diaz and Judge Harris
24 use the word "enforce," so Judge Diaz talks about relying, the
25 Government reliance on the savings clause provision as it

1 enforces the Orders; and Judge Harris talks about what the
2 Orders say on their face and how they are enforced are two
3 different things. Agency enforcement actions that go beyond
4 the Order's narrow scope may well raise serious First
5 Amendment and due process concerns.

6 So why aren't those references to as-applied challenges
7 as opposed to facial challenges?

8 **MS. MENSCHER:** I think, Your Honor, the real issue
9 is that the agencies as we understand it have adopted
10 agency-wide -- excuse me, Government-wide policies deciding to
11 implement the executive orders through these very broad-based
12 policies of terminating all grants, of terminating contracts,
13 of essentially following to a T the language laid out in the
14 Executive Orders and the context within it which we have
15 discussed with Your Honor extensively, and the reasons that
16 that violates the First and Fifth Amendment.

17 And when the agencies have now adopted these very broad
18 policies, that is, in fact, a part of as we understand it, the
19 Executive Orders themselves. And I think that the -- I'm
20 going to stop there for a moment.

21 **THE COURT:** Okay.

22 **MS. MENSCHER:** May I also, Your Honor, point you to
23 there's a case, I believe it is cited in our opening brief on
24 this motion which is at ECF 77. *Vantage Mobility v. Kersey*,
25 *836 F. App'x 496*. It's a Ninth Circuit case where there was a

1 Rule 59(e) motion within the time, the requisite time period.

2 And that was on a Preliminary Injunction.

3 I would also say the discussion with counsel about
4 whether we can amend and how we can amend, as I said earlier,
5 that's a little bit not part of this particular motion before
6 you at this very moment, but also how we are sort of making
7 our strategic decisions to serve our clients as best as we can
8 is a little bit -- it's a question for the Court and a
9 question for us about what we want to advocate. It would be
10 inappropriate at this point for defendants to say well, they
11 can't do this.

12 **THE COURT:** Well, to the extent I was asking
13 questions about plans, I'm trying to figure out whether and to
14 what extent the issues as presented that would be presented at
15 such future time and such future briefing on a future motion
16 for a Preliminary Injunction would be materially different
17 than where we are now if as I hear the anticipated claims
18 would remain facial claims.

19 **MS. MENSCHER:** Yes, Your Honor. That's accurate.

20 **THE COURT:** Okay.

21 **MS. MENSCHER:** And the one last case that I wanted
22 to also point Your Honor to is the Fourth Circuit in 1999 in
23 *Fobian v. Storage Tech*, 164 F.3d 887 talks about how this is
24 appropriate to vacate under Rule 59. It's not gamesmanship to
25 do so. And we are, in fact, trying to just avail ourselves of

1 the procedures set forth in the rules.

2 **THE COURT:** Okay. Thank you.

3 Ms. Gheibi, was there anything else you wanted to add?

4 **MS. GHEIBI:** Nothing from me. Thank you.

5 **THE COURT:** All right, I'll take this motion under
6 advisement and get you a decision as soon as I can. Thank
7 you, everybody.

8 **(Proceeding concluded at 3:42 p.m.)**

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1 CERTIFICATE OF OFFICIAL REPORTER

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5 I, Nadine M. Bachmann, Certified Realtime Reporter
6 and Registered Merit Reporter, in and for the United States
7 District Court for the District of Maryland, do hereby
8 certify, pursuant to 28 U.S.C. § 753, that the foregoing is a
9 true and correct transcript of the stenographically-reported
10 proceedings held in the above-entitled matter and that the
11 transcript page format is in conformance with the regulations
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14 Dated this 10th day of April, 2025.

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